

**TESTIMONY OF
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U.S. DEPARTMENT OF THE INTERIOR
BEFORE THE
COMMITTEE ON NATURAL RESOURCES
U.S. HOUSE OF REPRESENTATIVES
ON
H.R. 2837**

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Good morning, Mr. Chairman and Members of the Committee. My name is Carl Artman, and I am the Assistant Secretary-Indian Affairs at the Department of the Interior (Department). Thank you for the opportunity to present our views on H.R. 2837, the Indian Tribal Federal Recognition Administrative Procedures Act. The Department supports the efforts to improve the acknowledgment process embodied in H.R. 2837, however, as discussed below, the Department opposes the bill as written.

My testimony will address the current process and several proposals currently under consideration to improve the process. I will then turn to the legislation.

Implications of Federal Acknowledgment

The acknowledgment of the continued existence of another sovereign entity is one of the most solemn and important responsibilities delegated to the Secretary of the Interior. Federal acknowledgment enables that sovereign entity to participate in Federal programs for Indian tribes and acknowledges a government-to-government relationship between an Indian tribe and the United States.

These decisions have significant impacts on the petitioning group, the surrounding communities, and Federal, state, and local governments. Acknowledgment carries with it certain immunities and privileges, including partial exemptions from state and local criminal and civil jurisdictions, and the ability of newly acknowledged Indian tribes to undertake certain economic opportunities.

For instance, the Mashpee Wampanoag Indian Tribal Council recently received a positive decision under the Federal acknowledgment process and is now eligible to receive Federal health and education services for its members, to have the United States take land into trust that will not be subject to state taxation or jurisdiction, and to operate a gaming facility under the Indian Gaming Regulatory Act if it satisfies the conditions of that Act.

Background of the Federal Acknowledgement Process

The Federal acknowledgment process set forth in 25 C.F.R. Part 83, “Procedures for Establishing that an American Indian Group Exists as an Indian Tribe,” allows for the uniform and rigorous review necessary to make an informed decision on whether to acknowledge a petitioner’s government-to-government relationship with the United States. The regulations require groups to establish that they have had a substantially continuous tribal existence and have functioned as autonomous entities throughout history until the present. Under the Department’s regulations, petitioning groups must demonstrate that they meet each of seven mandatory criteria. The petitioner must:

- (a) demonstrate that it has been identified as an American Indian entity on a substantially continuous basis since 1900;
- (b) show that a predominant portion of the petitioning group comprises a distinct community and has existed as a community from historical times until the present;
- (c) demonstrate that it has maintained political influence or authority over its members as an autonomous entity from historical times until the present;
- (d) provide a copy of the group’s present governing document including its membership criteria;
- (e) demonstrate that its membership consists of individuals who descend from an historical Indian tribe or from historical Indian tribes that combined and functioned as a single autonomous political entity, and provide a current membership list;
- (f) show that the membership of the petitioning group is composed principally of persons who are not members of any acknowledged North American Indian tribe; and
- (g) demonstrate that neither the petitioner nor its members are the subject of congressional legislation that has expressly terminated or forbidden the Federal relationship.

A criterion is considered met if the available evidence establishes a reasonable likelihood of the validity of the facts relating to that criterion. A petitioner must satisfy all seven of the mandatory criteria in order for the Department to acknowledge the continued tribal existence of a group as an Indian tribe.

The Federal acknowledgment process is implemented by the Office of Federal Acknowledgment (OFA). OFA is currently staffed with a director, a secretary, four anthropologists, three genealogists and four historians. A team composed of one professional from each of the three disciplines reviews each petition. Additionally, OFA

has a contract that provides for three research assistants and three records management/Freedom of Information Act specialists, as well as one Federal acknowledgment specialist.

OFA's current workload consists of seven petitions on active consideration and ten fully documented petitions that are ready, waiting for active consideration. The administrative records for some completed petitions have been in excess of 30,000 pages. Two hundred forty-three other groups are not ready for evaluation because they have submitted only letters of intent to petition for federal acknowledgment as an Indian tribe or partial documentation.

The Interior Board of Indian Appeals (IBIA) just affirmed the negative final determinations for the Nipmuc petitioning groups 69A and 69B, but referred to the Secretary of the Interior issues as possible grounds for reconsideration. In addition, there are two pending lawsuits seeking review of acknowledgment decisions.

Proposed Improvements to the Federal Recognition Process

We are considering several actions to expedite and clarify the Federal acknowledgment process. Some of these would require changes to internal workload processes to eliminate backlogs and delays and some would require amendments to the regulations.

For example, we plan to distribute revised guidelines so petitioners and interested parties know what the OFA review teams expect and what the regulations require in order to provide more clarity in submissions. Additionally, to speed up the review, the OFA could recommend an application form for petitioners to use to point to the specific evidence in their submission that meets the criteria for specific time periods. OFA could also recommend petitioners present their genealogies in a common format used by genealogists (GEDCOM) and provide membership lists in an electronic database.

Once a petition has been received, the genealogist, historian and anthropologist in a research team evaluate a petition concurrently. We are considering changing this to a review in stages, with the genealogist first, followed by the historian and anthropologist. The genealogist's advance work, prior to the petition going on the "active" list, would prepare the way for the other professionals during the active review process. The OFA plans to develop lists of common questions and procedures that the research team or new research staff will use to speed up the evaluations and note the potential deficiencies in the petitions.

Further, OFA is looking at the possibility of moving to the front of the "Ready, Waiting for Active Consideration" list groups that can show residence and association on a state Indian reservation continuously for the past 100 years or groups that voted for the Indian Reorganization Act (IRA) in 1934, if the groups appear to have met subsections (e), (f), and (g) of 25 C.F.R. § 83.7.

Limiting the number of technical assistance reviews and imposing a time period for petitioner response to a technical assistance review letter would also move petitions along faster. We will attempt to create more concise decision documents to speed the process and improve the public's ability to understand the decision.

The Department also plans to post decisions and technical assistance letters on its website for public access. These steps would free OFA to spend more time on review of the petitions and allow for greater transparency to the general public.

Technological improvements would also speed the OFA's task. We plan to revise the Federal Acknowledgment Information Resource (FAIR) computer database. The final version of FAIR 2.0 will also allow for electronic redaction of documents under the Freedom of Information and Privacy Acts. In addition, revisions to the FAIR computer database would allow faster work. FAIR provides OFA researchers with immediate access to the records, and the revised version will speed up the indexing of documents and allow for more data review capabilities, allowing OFA researchers to make efficient use of their time. The Department plans to purchase a heavy duty scanner, new computers and printers, establish an internet connection and software for faster scanning and work.

Our goal is to improve the process so that all groups seeking acknowledgment can be processed and completed within a set timeframe. We are considering various proposals for improving the Federal acknowledgment process. Several options we may consider include:

- hire or contract additional staff;
- establish a timeline for responding to each step of the regulations to ensure that petitions move along;
- issue negative proposed findings or final determinations based on a single criterion to speed work and maximize researcher time use;
- allow for an expedited negative proposed finding if a petitioner has failed to adequately respond to a technical assistance review letter or refuses to submit additional required materials in response to this review; or
- move the "first sustained contact" requirement of 25 C.F.R. § 83.7(b) & (c) for some cases to start at the point when that area became a part of the United States or at the inception of the United States in 1776 to ease the burden on petitioners and reduce time-consuming research into colonial histories.

The Indian Tribal Federal Recognition Administrative Procedures Act

The stated purposes of H.R. 2837 include ensuring that when the United States acknowledges a group as an Indian tribe, that it does so with a consistent legal, factual and historical basis, using clear and consistent standards. Another purpose is to provide clear and consistent standards for the review of documented petitions for acknowledgment. Finally it attempts to clarify evidentiary standards and expedite the

administrative review process for petitions through establishing deadlines for decisions and providing adequate resources to process petitions.

While we agree with these goals, we do not believe H.R. 2837 achieves them. As such, and for the reasons discussed here, we opposed the legislation.

First and foremost, we object to the provisions within H.R. 2837 that create an independent commission tasked with making acknowledgement decisions, thus removing that authority from the Department of the Interior. Historically, the Department has had the authority, and the primary responsibility, for maintaining the trust relationship with Indian tribes, as well as the government's expertise and institutional knowledge on these issues. Moreover, the Department of Justice has indicated there are constitutional concerns with the appointment of members of the commission.

We are also concerned that H.R. 2837 would lower the standards for acknowledgment by requiring a showing of continued tribal existence only from 1900 to the present, rather than from first sustained contact with Europeans as provided for in 25 CFR section 83.7(b) and (c). Finally, the legislation, as drafted, could result in more limited participation by parties such as states and localities than provided for in the Department's regulations.

We want to acknowledge several provisions of H.R. 2837 that we view positively. For example, the bill would establish the criteria for acknowledgment through legislation, rather than through regulation. The Department supports this change as a means of affirming the Department's authority and giving clear Congressional direction as to what the criteria should be.

In addition, Congressional ratification of acknowledgment standards would speed up the process because the Department would no longer have to spend time and resources defending litigation challenging its authority to acknowledge tribes or the specific criteria used to do so. While several recent court decisions have upheld the Secretary's authority in this area, Congressional support would preclude further challenges.

The Administration is still reviewing other provisions of the bill and reserves the right to comment on these provisions at a later time.

Conclusion

We recognize the interest of the Congress in the acknowledgment process, and are willing to work with the Congress on legislative approaches to the Federal acknowledgment process. We believe that any legislation created should have standards at least as high as those currently in effect so that the process is open, transparent, timely, and equitable.

Thank you for the opportunity to provide my statement on the Federal acknowledgment process. I will be happy to answer any questions the Committee may have.